Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 80-77

October Term, 1979

JOSEPHINE LOPEZ,
Individually and as Guardian of
Joseph Lopez, and Incompetent,

Appellant,

vs.

THE CITY OF DAYTON, OHIO
and
GERALD J. LUCAS,

Respondents.

On Appeal From the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Supreme Court of Ohio is unreported but it is set forth in the Appendix on page 1a.

JURISDICTION

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2), this being an appeal which draws into question the validity of § 701.02 of the Ohio Revised Code infra p. 4, on the ground that it is repugnant to the Constitution of the United States.

Appellant's ward was severely injured when the Respondent's fire truck ran a red light and collided with his automobile. Appellant filed suit for damages in the Common Pleas Court of Montgomery County, Ohio. The Respondent's motion for summary judgment dismissing Plaintiff's complaint was sustained on the ground that § 701.02 of the Ohio Revised Code provides that a fireman and his employing municipality are not responsible for the fireman's negligence on the way to a fire. On appeal, the judgment of the trial court was affirmed by the Ohio

Second District Court of Appeals on November 29, 1979. An attempt to appeal from the Ohio Second District Court of Appeals was denied by the Ohio Supreme Court by order entered on April 4, 1980. A timely notice of appeal to this court was filed in the Montgomery County Common Pleas Court on June 24, 1980. As the Supreme Court of Ohio explicitly rejected Appellant's challenge to § 701.02 of the Ohio Revised Code this matter is appropriately brought to this Court by appeal.

In event that the Court does not consider appeal the proper mode of review, Appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment of the Constitution of the United States.

This case also involves § 701.02 of the Ohio Revised Code which states:

> Any municipal corporation shall be liable in damages for injury or loss to persons or property and for death by wrongful act caused by the negligence of its officers, agents, or servants while engaged in the operation of any vehicles upon the public highways of this state, under the same rules and subject to the same limitations as apply to private corporations for profit, but only when such officer, agent, or servant is engaged upon the business of the municipal corporation.
>
> The defense that the officer, agent, or servant of the municipal corporation was engaged in performing a governmental function, shall be a full defense as to the negligence of:
>
> (A) Members of the police department engaged in the operation of a motor vehicle while responding to an emergency call;
>
> (B) Members of the fire department while engaged in duty at a fire, or while proceeding toward a place where a fire is in progress or is believed to be in progress, or in answering any other emergency alarm.

Firemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle in the performance of a governmental function.

Policemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle while responding to an emergency call.

QUESTION PRESENTED

Whether § 701.02 of the Ohio Revised Code which grants immunity to municipal firemen for their negligent operation of a motor vehicle violates the due process and equal protection clauses of the fourteenth amendment.

STATEMENT

On May 11, 1976, while on the way to the Pepsi-Cola plant fire, the Respondents ran their fire engine through a red light at the intersection of First and Webster Streets in the city of Dayton, hit the Appellant's ward's automobile broad side and drove it into a light pole. As a result, the Appellant's ward suffered severe brain damage and has been deprived of full posession of his mental faculties. Plaintiff filed suit to seek compensation for the injuries caused by the negligence of the Respondents and the Respondents quite naturally filed a motion for summary judgment seeking dismissal of the suit relying upon § 701.02 of the Ohio Revised Code which says that a fireman and his employing municipality are not responsible for the fireman's negligence on the way to a fire. The court sustained the motion for summary judgment and rendered judgment in favor of the Respondents and it was from this judgment that appeal was taken to the Ohio Second District Court of Appeals which affirmed the judgment of the trial court and it was from this affirmation that appeal was attempted to the Ohio Supreme Court which court dismissed the attempted appeal.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The Respondents' motion for summary judgment in the trial court relied solely upon the provisions of § 701.02 of the Ohio Revised Code which granted them absolute immunity under the facts of the instant case. Appellant in her memorandum in opposition to the motion, pointed out to the court that the statute being relied upon by the Respondents violated the Fourteenth Amendment of the United States Constitution, because the Plaintiff and her ward have a fundamental interest in having access to the courts to remedy a wrong and the statute is denying that equal protection with regard to that interest. The trial court in ruling upon the Respondents' motion for summary judgment ignored the Defendant's constitutional arguements and relied solely upon the language of § 701.02 of the Ohio Revised Code in sustaining the Respondents's motion. On appeal to the Ohio Second District Court of Appeals, the Appellant set forth the following as her second assignment of error:

> The trial court erred in failing to find that O.R.C. 701.02 is unconstitutional and void for violating Article 1, Sections 2 and 16 of the Ohio Constitution and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

The Ohio Second District Court of Appeals responded to this argument as follows:

> Nor may Appellants rely upon the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In *Krause vs. State,* 31 Ohio St. 2d 132 (1972), the Court ruled that while it did not concede that soverign immunity involved any classification whatever, assuming, "arguendo that there is in fact a classification, it is one which the General Assembly is empowered to make" without offending the Fourteenth Amendment.
>
> The immunity afforded by Section 701.02 of the Ohio Revised Code presents a stronger case for reaching the same conclusion reached in *Krause vs. State,* supra. If it involves

any classification at all, Section 701.02 has a rational basis in fact supported by substantial justification. The immunity preserved for the operation of municipal vehicles, is limited to the operation of police and fire vehicles during emergencies where lives and property may be lost if response is not immediate. (Infra p. 7a).

On appeal to the Ohio Supreme Court, the Appellant in her memorandum and support of jurisdiction set forth the following proposition of law which she requested that the court adopt:

> O.R.C. 701.02 confers immunity upon a special class of drivers, thereby creating a special class of injured parties who are denied a remedy and equal protection of the law. O.R.C. 701.02 is therefore invalid for violating Article 1, Sections 2 and 16 of the Ohio Constitution and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Furthermore, in the aforesaid memorandum with regard to the question of whether a substantial constitutional question is involved, the Appellant stated as follows:

> With regard to the question of whether this particular case involves a substantial constitutional question, it should be quite obvious that it does. The second proposition of law is solely constitutional, relying on provisions of both the Ohio and the United States Constitution. Either O.R.C. 701.02 deprives an injured party of constitutionally created equal protection of the laws or it does not. Likewise, the statute either deprives an injured party of a constitutionally protected remedy or it does not. The answers to these questions requires a substantial interpretation of the constitutional provisions involved and accordingly, the case obviously involves a substantial constitutional question.

The Ohio Supreme Court nevertheless, dismissed the appeal for the reason that "No substantial constitutional question exists herein." The ruling of the Supreme Court was entered by the Court of Appeals on April 4, 1980.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

While soverign immunity cases most often involved arguments regarding whether soverign immunity is justified as a matter of public policy, the case of bar also involves substantial federal questions, because § 701.02 is not an absolute grant of immunity, but rather it is a grant of immunity to a selected few. The point is that the Appellant and her ward have a fundamental interest in having access to the courts to remedy a wrong, and they have a right to equal protection with regard to that interest. Many courts including the Ohio Supreme Court have declared guest statutes unconstitutional, because they violate these constitutional principles in that they deprive an automobile passenger from his remedy for a driver's negligence merely because he happened to be in the driver's car rather than in somebody else's car without any compelling reason for doing so. The situation in the case of bar is no different. The Appellant and her ward are being deprived of their remedy for the wrong done to them merely because it was a fire engine that ran the red light rather than some other kind of car. Even if there could be some threat of justification for soverign immunity, such justification has not sufficiently compelling to warrant depriving the Appellant and her ward of their constitutional right to remedy.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

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CERTIFICATE OF SERVICE

Appendix service has been made upon all parties of record.

C. ROBERT SWANINGER
Counsel for Appellant

CERTIFICATE OF SERVICE

I, C. Robert Swaninger, one of the attorneys for Jose-phine Lopez, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 25th day of June, 1980, I served copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States on William L. Havemann, Attorney of Records for the Respondents, by mailing it to his office at 2700 Winters Bank Tower, Dayton, Ohio 45402.

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APPENDIX A

Decision of the Montgomery County, Ohio Common Pleas Court on Motion for Summary Judgment

JOSEPHINE LOPEZ, Plaintiff, vs. THE CITY OF DAYTON, OHIO et al., Defendants.

Decided March 16, 1979

This case is before the Court on consideration of Defendant's City of Dayton, Ohio and Gerald J. Lucas, Motion pursuant to Rule 12 (B) 6 of the Ohio Rules of Civil Procedure. This Motion to Dismiss is being made on the grounds that the Complaint does not state a claim upon which relief can be granted.

In the alternative, said Defendants move the Court for an order granting summary judgment in favor of the Defendants and against the Plaintiffs pursuant to Rule 56 of the Ohio Rules of Civil Procedure for the reason that there is no genuine issue as to any material fact and that Defendants are entitled to judgment as a matter of law.

The affidavit of Gerald J. Lucas submitted in support of the Motion for Summary Judgment shows that on May 11, 1976, Lucas was working out of Station 15 located at 1861 Wayne Avenue, Dayton, Ohio. The affidavit further states that at about 7:22 p.m. on that day Fire Station 15 received a second alarm fire notice to respond to Melbourne Avenue, Dayton, Ohio at the Pepsi Cola Bottling plant at which time affiant entered the fire engine as the driver of the vehicle, turned on the flashing lights and siren and proceeded to the site of the fire. As he approached the intersection of Webster and East First Street, reduced his speed to ten or twelve miles per hour as he entered the intersection, saw a car headed eastbound into the path of the fire engine. Affiant states that he tried to swerve to the right and applied the brakes, but he was unable to avoid the collision with the eastbound vehicle.

Section 701.02 of the Ohio Revised Code provides in pertinent part:

"701.02 Liability of municipal corporations for operation of vehicles; nonliability of policemen and firemen.
Par. 2
The defense that the officer, agent, or servant of the municipal corporation was engaged in performing a governmental function, shall be a full defense as to the negligence of:

(B) Members of the fire department while engaged in duty at a fire, or while proceeding toward a place where a fire is in progress or is believed to be in progress, or in answering any other emergency alarm.
Par. 3
Firemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle in the performance of a governmental function." *Nanna V. Village of McArthur,* 44 Ohio App. 2d 22 at 2
"It is apparent that the General Assembly intended by such statute to abolish immunity for municipalities in the operation of motor vehicles even though a governmental function is involved, *except* where a fire department is in the process of fighting a fire, proceeding to a place where a fire is believed to be, or answering other emergency alarms. *Rankin v. Sander* (1953), 96 Ohio App. 40. The statute also created a personal immunity to the members of the fire department while operating a motor vehicle in the performance of a governmental function. See 3 Akron Law Review 188 for a detailed analysis of R.C. 701.02." (Emphasis added)

This is true even if the fire equipment is being driven to a place in response to a fire outside of the municipality pursuant to a contract authorized by Section 717.02 of the Ohio Revised Code.

There being no dispute as to any material facts, and the law being clear with regard to the liability of the municipalities and firemen as set forth above, the Motion for Summary Judgment is granted.

So ordered: W. Erwin Kilpatrick, Judge

Judgment Entry of the Montgomery County, Ohio Common Pleas Court

Filed March 30, 1979

This matter came before the Court on the motion of the Defendants on their motion to dismiss or in the alternative motion for summary judgment in favor of the Defendants under Rule 12(B) 6 or Rule 56 of the Ohio Rules of Civil Procedure.

The Court being fully advised in the premises and after due consideration of the affidavit of the Defendant Gerald J. Lucas and memoranda filed in support and in opposition of the motions, and upon consideration of the pleadings, the Court finds that the motion of the Defendants for summary judgment in their favor should be sustained for the reason that there is no dispute as to any material fact and under the law of the State of Ohio the liability of municipalities and firemen is restricted by Section 701.02 of the Ohio Revised Code, the Defendants are entitled to judgment in their favor as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the motion of the Defendants for summary judgment be, and the same hereby is, sustained and this action is dismissed at the cost of the Plaintiff.

Approved: W. Erwin Kilpatrick, Judge

Opinion of Montgomery County, Ohio Court of Appeals

Decided: November 29, 1979

Sherer, P.J. (By Assignment)

On May 11, 1976, while on the way to the Pepsi-Cola fire, the defendants ran their fire engine through a red light at the intersection of First and Webster Streets in the City of Dayton, hit plaintiff's ward's automobile broadside and drove it into a light pole. As a result, the plaintiff's ward suffered severe brain damage and has been deprived of full possession of his mental faculties. Plaintiff filed suit to seek compensation for the injuries caused by the negligence of the defendants and the defendants filed a motion for summary judgment seeking dismissal of the suit relying upon O.R.C. 701.02 which says that a fireman and his employing municipality are not responsible for the fireman's negligence on the way to a fire. The court sustained the motion for summary judgment and rendered judgment in favor of the defendants and it is from this judgment that the within appeal is taken. Appellant assigns two errors to the action of the Common Pleas Court:

(1) The trial court erred in failing to find that sovereign immunity as established by O.R.C. 701.02 is no longer justified, thereby causing the statute to be invalid.

(2) The trial court erred in failing to find the O.R.C. 701.02 is unconstitutional and void for violating Article I, Sections 2 and 16 of the Ohio Constitution and the equal protection clause of the Fourteenth Amendment of the United States Constitution.

R.C. 701.02 provides that neither a municipality nor its firemen may be held for negligence committed while proceeding to a fire in progress or in answering any other emergency alarm.

Section 16, Article I of the Ohio Constitution provides:

> "Suits may be brought against the State, in such courts and in such manner, as may be provided by law."

The amendment is not self-executing, and statutory authority is required as a prerequisite to the bringing of suits against the state. *Haas vs. Hayslip,* 51 Ohio St. 2d 135, 137 (1977).

R.C. 2743. 01 (A) defines "State" and provides that the word does not include political subdivisions of the state.

R.C. 2743.01 (B) defines political subdivisions. Such definition includes municipalities.

R.C. 2743.02 (A) waives the state's immunity from liability. In *Haas vs. Hayslip,* 51 Ohio St. 2d 135, 137, the Supreme Court stated that R.C. 2743.01 and 2743.02 "are forthright and unambiguous, and permit facile discernment of the legislative intent to preserve the defense of sovereign immunity to political subdivisions except as otherwise expressed by the General Assembly."

Appellant argues that Section 701.02, Ohio Revised Code, is violative of Article I, Sections 2 and 16 of the Ohio Constitution and the Fourteenth Amendment to the Constitution of the United States. Article I, Section 2 cannot be considered in the absence of Section 16 of the same Article, and since Section 16 provides for the very immunity which appellant seeks to avoid, appellant cannot very well rely upon that provision. *Haas vs. Hayslip,* supra.

Nor may appellants rely upon the equal protection clause of the Fourteenth Amendment to the United States Constitution. In *Kraus vs. State,* 31 Ohio St. 2d 132 (1972), the Court ruled that while it did not concede that sovereign immunity involved any classification whatever, assuming, "arguendo that there is in fact a classification, it is one which the General Assembly is empowered to make" without offending the Fourteenth Amendment.

The immunity afforded by Section 701.02 of the Ohio Revised Code presents a stronger case for reaching the same conclusion reached in *Krause vs. State,* supra. If it involves any classification at all, Section 701.02 has a rational basis in fact supported by substantial justification. The immunity preserved for the operation of municipal vehicles, is limited to the operation of police and fire vehicles during emergencies where lives and property may be lost in response is not immediate.

We see no merit in the errors assigned and the judgment of the Common Pleas Court will be affirmed.

Ziegel and Kerns, JJ., concur.

Final Entry of Montgomery County, Ohio
Court of Appeals

Filed November 29, 1979

By the Court:

Pursuant to the opinion rendered on the 29th day of November, 1979, the judgment of the Common Pleas Court is hereby affirmed.

Paul Sherer, Presiding Judge (By assignment)
Donald L. Ziegel, Judge (By assignment)
Joseph D. Kerns, Judge

Dismissal of Appeal
By Supreme Court of Ohio

Entered April 4, 1980

This cause, here on appeal as of right from the Court of Appeals for Montgomery County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Montgomery County for entry.

APPENDIX B

COURT OF APPEALS
State of Ohio

JOSEPHINE LOPEZ

Plaintiff—Appellant

-against-

THE CITY OF DAYTON, OHIO
et al.,

Defendants—Appellants

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Josephine Lopez the Plaintiff Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Ohio dismission an appeal from the court of appeals from Montgomery County entered in this action on April 4, 1980. This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

MICHAEL J. MCDONALD
C. ROBERT SWANINGER
Attorneys for Appellant

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOSEPHINE LOPEZ, et al.,

Appellants,

v.

THE CITY OF DAYTON, et al.,

Appellees.

On Appeal From The Supreme Court of Ohio

MOTION TO DISMISS OR AFFIRM

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In The

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October Term, 1980

JOSEPHINE LOPEZ, Individually and
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Appellants,

v.

THE CITY OF DAYTON and
GERALD J. LUCAS,

Appellees.

On Appeal From The Supreme Court of Ohio

MOTION TO DISMISS OR AFFIRM

OPINION BELOW

The opinion of the Supreme Court of Ohio is unreported but it is set forth in the Appendix on Page 1a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eleventh and Fourteenth Amendments to the Constitution of the United States.

This case also involves Section 701.02 of the Ohio Revised Code which provides:

> "Any municipal corporation shall be liable in damages for injury or loss to persons or property and for death by wrongful act caused by the negligence of its officers, agents or servants while engaged in the operation of any vehicle upon the public highways of this state, under the same rules and subject to the same limitations as apply to private corporations for profit, but only when such officer, agent, or servant is engaged upon the business of the municipal corporation.
>
> The defense that the officer, agent or servant of the municipal corporation was engaged in performing a governmental function, shall be a full defense as to the negligence of:
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> (A) Members of the police department engaged in the operation of a motor vehicle while responding to an emergency call;
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> (B) Members of the fire department while engaged in duty at a fire, or while proceeding toward a place where a fire is in progress or is believed to be in progress, or in answering any other emergency alarm.
>
> Firemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle in the performance of a governmental function.
>
> Policemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle while responding to an emergency call."

This case also involves Rule IX of the Rules of the Supreme Court of Ohio which provides in pertinent part:

RULE IX
MOTIONS FOR REHEARING AND ISSUANCE OF MANDATE

"Section 2. Issuance of Mandate.

Ten days after the announcement of a decision on the merits, unless a motion for rehearing is filed, the Clerk shall issue a mandate in conformity to the entry of the Court. If a motion for rehearing is filed and denied, the mandate shall issue at the same time as the decision on the motion for rehearing. No mandate shall issue on denial of a motion to certify or a motion for leave to appeal, or upon the sustaining of a motion to dismiss an appeal as one not involving a substantial constitutional question."

QUESTIONS PRESENTED

I

Whether Appellants' appeal was timely filed.

II

Whether the state and its political subdivisions are immune to an action for damages arising out of performance of a governmental function, absent consent.

III

Whether a state may extend its sovereign immunity to municipalities and employees thereof while such employees are responding to an emergency call without offending the Fourteenth Amendment.

STATEMENT

On May 10, 1978, Appellant filed a Complaint in the Common Pleas Court of Montgomery County, Ohio, alleging that her ward was injured when Appellee, Gerald J. Lucas, operated a fire engine through a red light at an intersection in Dayton, Ohio. Mr. Lucas was employed as a firefighter by Appellee, City of Dayton, at the time of the accident. It is undisputed that Lucas was on his way to a fire at a bottling plant in Dayton.

On March 30, 1979, the trial court entered summary judgment in favor of defendants due to the immunity provisions found in Section 701.02 of the Ohio Revised Code. The Second District Court of Appeals for the State of Ohio affirmed. On March 20, 1980, the Supreme Court of Ohio sua sponte dismissed Appellant's appeal to that Court "for the reason that no substantial constitutional question exists herein." See page 1a of Appendix.

Although Appellant suggests in her Statement of Facts that the final Order of the Ohio Supreme Court was entered on April 4, 1980, it is apparent from a review of the Order itself (reproduced at page 1a of the Appendix) that the Order was entered on the docket of the Supreme Court of Ohio on March 20, 1980, not April 4, 1980. A true and certified copy of the Order together with an Affidavit of the Deputy Clerk of the Supreme Court of Ohio has been filed with the office of the Clerk of the Supreme Court of the United States. The Affidavit is also reproduced in the Appendix. See page 3a.

The Order was certified to the Court of Appeals of Montgomery County, Ohio, Second Appellate District, and entered in that Court on April 4, 1980. Again, however, the final Order was docketed in the Supreme Court of Ohio on March 20, 1980.

Appellant filed a Notice of Appeal to the Supreme Court of the United States in the Common Pleas Court of Montgomery County, Ohio on June 24, 1980, that is, ninety six days after final judgment was entered in the Supreme Court of Ohio and attempted to docket the within appeal in this Court on June 26, 1980, eight days beyond the time for perfecting the appeal.

ARGUMENT

I. Appellant's appeal was untimely and should be dismissed.

As noted in the foregoing Statement of Facts, the judgment from which Appellant appeals was entered in the Supreme Court of Ohio on March 20, 1980, that is, ninety eight days before she attempted to docket her appeal in this Court.

Appellant was required to perfect her appeal within ninety days. 28 U.S.C. § 210 (c) ; Rule 11, Revised Rules of the Supreme Court of the United States.

Although it appears from the record that Appellant filed her appeal within ninety days after the intermediate court docketed the entry certified to it by the Clerk of the Ohio Supreme Court, the appeal was, nevertheless, untimely. The act of the Clerk of the Court of Appeals in docketing the entry of the Ohio Supreme Court was ministerial at best. The statutory period began to run from the entry of judgment in the Ohio Supreme Court, not the Court of Appeals. *Boylan* v. *United States,* 257 U.S. 614 (1921).

A judgment for purposes of appeal is final when the issues are "adjudged and settled with finality," that is,

when judgment is entered in the Court from which an appeal is taken. *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 427 (1969); *Marquette National Bank* v. *First of Omaha Corporation*, 439 U.S. 299, 541 (1978).

The judgment from which Appellant appeals was final when the entry was filed in the Supreme Court of Ohio on March 20, 1980. The rights of the parties were determined with finality at that time. Summary judgment had been entered against plaintiff in the trial court. On November 29, 1979, that judgment was affirmed in the Court of Appeals. See page A6 of the Appendix attached to Appellant's Jurisdictional Statement. The Court of Appeals did not remand the case to the trial court. On March 20, 1980, the Supreme Court of Ohio dismissed Appellant's appeal to the Court for want of a substantial constitutional question. Although the judgment entry filed in the Supreme Court was certified by its Clerk to the Court of Appeals for filing in that Court, no mandate issued. In fact, the Rules of the Supreme Court of Ohio provided otherwise. Ohio Supreme Court Rule IX (2) provides in pertinent part:

> ". . . No mandate shall issue . . . upon the sustaining of a motion to dismiss an appeal as one not involving a substantial constitutional question."

In short, once the entry was filed in the Ohio Supreme Court, there was nothing left to be done which could have conceivably affected the rights of the parties.

It is respectfully submitted, therefore, that Appellant's appeal was untimely and should be dismissed.

II. A state and its political subdivisions are immune to an action for damages arising out of the performance of a governmental function, absent consent.

It should be noted that Appellant does not maintain that the immunity afforded Appellees must be overlooked to protect any particular, fundamental right guaranteed her by the Constitution of the United States. Appellant does not maintain that Appellees, for example, have acted under color of law, unconstitutionally toward her. She claims only that sovereign immunity is unconstitutional because it deprives her and others similarly situated of the right to sue the state.

It is well established, however, that the right of a citizen to sue the state cannot be derived from the Constitution or laws of the United States. *Palmer* v. *Ohio,* 247 U.S. 32 (1918).

The inherent nature of sovereignty itself coupled with the Court's interpretation of the eleventh amendment precludes a suit against the state without its consent. *Employees of the Dept. of Public Health and Welfare, State of Missouri* v. *Dept. of Public Health and Welfare, State of Missouri,* 441 U.S. 279 (1973); *Hans* v. *Louisiana,* 134 U.S. 1 (1890).

Under the circumstances, the issue raised by Appellant should be dismissed for want of jurisdiction.

III. A state may extend its sovereign immunity to municipalities and the employees thereof while such employees are responding to an emergency call without offending the Fourteenth Amendment.

Even if the State of Ohio and City of Dayton could be sued without the state's consent, Appellant's claim does not invoke, as the Supreme Court of Ohio has noted, a substantial constitutional question.

Section 701.02 of the Ohio Revised Code is not by any means discriminatory. It provides that municipalities, its police officers and firemen are immune to a suit for damages arising out of their conduct during an emergency. No classification is involved. The statute treats Appellant and all others equally. *No one* may sue an Ohio municipality, its police officers or firefighters under such circumstances.

Moreover, even if a classification could be conceived, it is readily apparent from the face of the statute that it was designed to and does further a legitimate state interest. Appellant does not claim that any "fundamental" interest recognized under the Constitution or federal laws has been abridged, or that she is a member of any "suspect" class. In the absence of such considerations, the statute must be upheld if there is any conceivable set of facts under which the classification, if that is what it is, rationally furthers a legitimate legislative objective. *McGowan* v. *Maryland,* 366 U.S. 420 (1961).

The immunity afforded municipalities in Ohio and their firefighters by Section 701.02 of the Ohio Revised Code is limited to the negligence of members of the fire department while actually engaged in the duty of fighting a fire "or while proceeding toward a place where a fire is in pro-

gress or is believed to be in progres, or in answering any other emergency alarm", that is, under circumstances where lives and property may be lost if response is not immediate.

This matter having been disposed of by motion for summary judgment in the trial court, there is no evidence of record to rebut the overwhelming state interest apparent from the face of the statute itself.

CONCLUSION

For any one of the reasons set forth above, appellees request that this Court dismiss Appellant's appeal and/or affirm the judgment entered in the Supreme Court of Ohio on March 20, 1980.

Respectfully submitted,

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Counsel of Record
William L. Havemann

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(513) 223-1130

Attorneys for Appellees

APPENDIX

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

1980 Term

To wit: March 20, 1980

No. 80-106

THE STATE OF OHIO,
City of Columbus
Josephine Lopez, etc.,

Appellant,

v.

City of Dayton, et al.,

Appellees.

APPEAL FROM THE COURT OF APPEALS for MONTGOMERY County

This cause, here on appeal as a right from the Court of Appeals for MONTGOMERY County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of Court of Appeals for MONTGOMERY County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of APR 01 1980, 19....

THOMAS L. STARTZMAN
Clerk

SAM F. ATKINS
Deputy

AFFIDAVIT OF THE DEPUTY CLERK OF THE SUPREME COURT OF OHIO

STATE OF OHIO)
) SS: AFFIDAVIT
COUNTY OF FRANKLIN)

After having been duly cautioned and sworn according to law, the undersigned deposes and says as follows:

(1) That he is an adult, that he has personal knowledge of the matters stated herein, and is competent to testify thereto;

(2) That he is the Deputy Clerk of the Supreme Court of Ohio;

(3) That the Entry hereto attached and marked Exhibit A, dismissing appeal number 80-106, and entitled *Josephine Lopez, Etc., Appellant* v. *City of Dayton, et al, Appellees,* was entered on the docket of the Supreme Court of Ohio on March 20, 1980.

/s/ SAM F. ATKINS
Sam F. Atkins
Deputy Clerk,
Supreme Court of Ohio

Sworn to before me and subscribed in my presence by the said Sam F. Atkins, this 31st day of July, 1980.

/s/ WILLIAM L. HAVEMANN, Attorney

. . . . . .

Notary Public